STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-20-126

DELBERT REED, INDUSTRIAL ENERGY CONSUMER GROUP, and MAINE STATE CHAMBER OF COMMERCE
Appellants,

v.

SECRETARY OF STATE MATTHEW DUNLAP,
in his capacity as Secretary of State for the State of Maine, MAINERS FOR LOCAL POWER PAC, and NEXTERA ENERGY RESOURCES, LLC
Appellees

On Appeal from Business and Consumer Court
Docket No. BCD-AP-20-02

BRIEF OF APPELLANT INDUSTRIAL ENERGY CONSUMER GROUP

Sigmund D. Schutz, Bar No. 8549
Anthony W. Buxton, Bar No. 1714
Robert B. Borowski, Bar No. 4905

Preti Flaherty Beliveau & Pachios LLP
P.O. Box 9546, One City Center
Portland, ME 04112
Telephone: 207-791-3000
sschutz@preti.com
abuxton@preti.com
rborowski@preti.com

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INTRODUCTION

Industrial Energy Consumer Group[1] ("IECG"), a stranger to Maine election-law disputes, appeals (under 21-A M.R.S. § 905(3)) the decision of the Secretary of State to validate initiative petitions despite the Secretary's failure to vigorously and thoroughly review the petitions as Maine law requires. The Secretary's failure undermines the rights of the vast majority of Maine citizens to be free of the uncertainty and chaos that will arise if such a momentous initiative is validated when the statutory requirements for validation have not been met. The pending referendum hangs threateningly over essential infrastructure lawfully approved by multiple public agencies in two states.

There can be no doubt that this initiative is momentous in precedent and effect.[2] The initiative would reverse the Maine Public Utilities Commission's ("PUC's") final order approving the New England Clean Energy

[1] IECG is a Maine incorporated association that has represented Maine industrial energy consumers before state, federal, and regional regulatory, legislative, and congressional bodies on energy-related issues. IECG participates in proceedings to affect the price, diversity, origins, reliability, and effects of Maine's energy supplies, including electricity, and to improve and protect regulatory processes and policies affecting energy infrastructure. IECG is concerned that regulatory processes make it possible to efficiently meet Maine's strong climate goals through access to renewable energy, including hydropower from Quebec via NECEC. (*See* IECG Mot. to Intervene (Mar. 25, 2020).) IECG's members have no direct financial interest in NECEC, but like other Maine electricity consumers, they have an interest in a society where the electric grid works well and the laws are observed. IECG participated in various administrative proceedings involving NECEC.

[2] IECG notes that, contrary to the Superior Court, determination of the constitutionality of rejecting a project properly approved by the PUC and affirmed by this Court need not wait for the initiative to be placed on the ballot and approved or disapproved. That issue was not, however, before the Secretary, and is not part of this appeal.

Connect transmission project ("NECEC"), as affirmed by this Court on appeal.[3] The initiative would direct the PUC to "deny the request for a Certificate of Public Convenience and Necessity for the NECEC." The initiative threatens Maine's ability to make energy policy decisions based on science and reason and to develop infrastructure essential to achieving its climate goals and ensure the reliable operation of the New England electric grid. Here, as with every initiative, it is imperative that the Secretary ensure the initiative process is conducted with scrupulous adherence to the law. That did not happen.

The conduct of American elections has changed dramatically since the right of citizens to directly initiate legislation was added to the Maine Constitution in 1908, influenced by factors such as vast increases in wealth, a revolution in information technology, and population growth. The Legislature recognized the effects of these changes in 1975 by adopting statutory procedures to ensure that the initiative process remains credible and effective and by providing for judicial review. More recently, in response to increased incidence of forgery and other forms of fraud, campaigns run by professional signature-gathering companies and paid for by out-of-state interest groups,[4]

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[3] *NextEra Energy Resources, LLC v. Maine Public Utilities Comm'n,* 2020 ME 34, __ A.3d __.

[4] *See* Mark Peters, *Need Signatures? Many Turn to a Pro. Once Banned by Law, Paid Collectors are Now Key to the Petition Process*, Portland Press Herald, Feb. 20, 2006 ("A signature is a valid commodity in Maine. . . . Few of Maine's citizen initiative drives are strictly volunteer anymore. Most organizers contract with local consultants or national firms . . . ."); Richard J. Ellis, *Signature*

and other questionable signature-collection practices, the Legislature made additional changes to the process, requiring disclosure of paid circulators and financial contributions and taking other steps to prevent corruption.[5] While our great-grandparents acting at the height of the Progressive Era may have viewed initiatives as a democracy-enhancing mechanism, the Legislature has since recognized that initiated referenda can be just as subject to corruption as other aspects of democracy, and has acted to guard against that risk. "What we see now is big money can buy referendums."[6]

Under Maine law as it has evolved since 1908, the Secretary must enforce the rules that guarantee that initiatives are lawfully conducted and genuine. That includes rules requiring that notaries who administer oaths and certify petitions adhere to requirements designed to ensure the authenticity of signatures and exercise dispassionate judgment by avoiding conflicts of interest. Because the Secretary failed to investigate evidence of fraud in connection with this initiative, accepted petitions as valid without sufficient evidence to do so, and neglected to enforce prohibitions that remove

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Gathering in the Initiative Process: How Democratic is it?, 64 Mont. L. Rev. 35, 36–37 (2003) (stating that "the great majority of those people behind petition tables are not idealistic volunteers but are instead interested mercenaries, bounty hunters, paid by the signature, and largely indifferent to the substance of the petition").

[5] *See generally*, P.L. 2018, Ch. 418.

[6] Peters, *supra* note 5.

a notary's authority to act when conflicts of interest are present (precluding dispassionate judgment), his decision must be vacated.

FACTS

A. New England Clean Energy Connect

NECEC is a billion-dollar shovel-ready electric infrastructure project that will bring hydroelectric power from Quebec to New England. With most of the required regulatory approvals in place, construction is poised to start. Funded exclusively by Massachusetts ratepayers, NECEC would lower regional electricity costs by $14 million to $44 million annually, increase electric grid reliability, reduce regional carbon emissions by 3.0 to 3.6 million metric tons annually, and add nearly $100 million to Maine's gross domestic product, plus "almost $250 million of additional financial benefits for Maine."[7]

NECEC has navigated a rigorous regulatory process commensurate with its critical importance to Maine and Massachusetts, to the reliability of the regional electric grid, and to electricity consumers and the environment. This comprehensive science-based regulatory process employs expert testimony and cross examination to produce reasoned decisions that balance societal needs. The certainty the regulatory process provides for regulated entities

[7] *NextEra Energy Resources, LLC v. Maine Public Utilities Comm'n*, 2020 ME 34, ¶¶ 8 n.9, 30 n.14, __ A.3d __.

and the public is a hallmark of the rule of law and is essential to the proper and efficient functioning of our complex, digitally powered (by electricity) society. Affirming the Secretary's administrative decision would cast a cloud of unprecedented uncertainty over NECEC and, more importantly, the science- and reason-based truth-seeking processes used to approve such projects, by creating the real risk that properly approved projects can be upended by wealthy competitors who finance a flawed initiative campaign.

The initiative would turn the State's regulatory system on its head, disrupting the legal and regulatory framework upon which regulated entities and the public have relied for a century. The signal sent would be that final PUC actions, even after being reviewed and upheld by this Court, are still only as good as their ability to withstand an unsuccessful competitor's unlawful initiated referendum and the political tides of the day. Regulatory chaos would ensue. *See Morris v. Goss,* 147 Me. 89, 106, 83 A.2d 556, 565 (1951) ("The unrestrained power to block such legislative action, if lodged in the hands of ten percentum of the number of qualified electors . . . would confer upon a small minority of the people the power to produce absolute chaos."). NECEC developed, not out of such chaos, but out of the reasoned and deliberate processes of at least six state agencies in Maine and Massachusetts—processes the public and IECG have relied on.

B. Petition for Initiated Legislation to Reject the NECEC Project.

On February 3, 2020, the Secretary received petitions containing 82,449 signatures in support of an initiative entitled "Resolve, To Reject the New England Clean Energy Connect Transmission Project." (A. 142.) On that same day, Revolution Field Strategies ("Revolution"), a consulting business listing a Washington, D.C. address, filed a "Petition Organization Registration Application" to pursue the petition. (A. 56.) A "petition organization" is "a business entity that receives compensation for organizing, supervising or managing the circulation of petitions for a direct initiative of legislation . . . ." 21-A M.R.S. § 903-C. Revolution was hired by Mainers for Local Power to assist with its effort to pursue the direct initiative; both are referred to collectively as the "Proponent" of the initiative in this brief.

With its application to register as a petition organization, Revolution attached a list of all paid staff it had hired to assist in circulating petitions or in organizing, supervising or managing the circulation of petitions, as required by 21-A M.R.S. § 903-C(1)(D). (A. 58.) The list includes Leah Flumerfelt, David McGovern, Sr., and Michael Underhill. (*Id*.) Each of them subsequently notarized petitions, even though Maine law imposes explicit and strict conflict of interest rules on notaries for initiatives—rules that remove a notary's

authority to act if the notary performs non-notarial services for the initiative campaign. *See id.* § 903-E; 4 M.R.S. § 954-A.

C. Staff Hired by the Proponent Engaged in Fraud and Forgery.

The record contains substantial and unrebutted evidence of fraud and forgery by Revolution's paid staff.[8] A Revolution circulator, Megan St. Peter, forged signatures on petitions submitted to the Secretary in support of the initiative. (A. 149, ¶ 8.) Two witnesses attested that they had not signed the initiative petition and had not lived at the address listed on the petition for many years. (A. 254–58.) One witness, Nina Fisher, averred that the signature and handwriting on the petition are not hers and that she had not lived at the address listed in the petition for 20 years, had never met the petition circulator, and "never would have signed the petition as I am supportive of the clean energy transmission line." (A. 258.) Fisher testified:

> I am deeply troubled that the opponents of the clean energy transmission line would fraudulently misappropriate my identity, especially because I work for the State of Maine in a public capacity and could have suffered professional ramifications as a result.

[8] In his March 4, 2020, initial determination the Secretary declined to consider any of this information because "[t]his office did not have sufficient time . . . to investigate this matter prior to the statutory deadline for issuing this decision and thus make no findings regarding the allegations." (A. 142 at 2 n.1.) The facts recited here are contained in the administrative record and all of them came to the Secretary's attention before he issued his final determination, except for information that one of Revolution's circulators was fired—a fact contained in Mainers for Local Power's Rule 80C Brief. (*See* Mainers for Local Power M.R. Civ. P. 80C Br. at 17 n.9.)

(*Id*.) The other witness, Warren Winslow, testified similarly that the signature and handwriting on the petition are not his and that he had not lived at the address listed for 15 years, had never met the petition circulator, and "never would have [signed the petition] because I strongly support the clean energy transmission line, which I believe will provide great benefits to Maine people, to our economy and to the environment." (A. 255.) Winslow testified:

> I am outraged that the opponents of the clean energy transmission line would fraudulently misappropriate my identity in service of a proposed ballot initiative that I strongly oppose. These actions are truly despicable.

(*Id*.) The record does not reveal how Revolution or its circulator found the old addresses that they fraudulently listed on the petition, but they may have obtained old voting rolls and made them available to circulators.

The Secretary also received evidence that one of Revolution's salaried supervisors, Melissa Burnham,[9] engaged in fraud. (A. 231.) Burnham was St. Peter's supervisor, the campaign's Augusta "office coordinator," and is reported to have knowingly submitted forged signatures to the Secretary. (A. 231–32.) Revolution's supervisors inspect and "do an initial check" of petition sheets "to ensure that each sheet is filled out properly." (A. 207.) In the Superior Court, Mainers for Local Power revealed that St. Peter was fired by

[9] Burnham is listed on the "Petition Organization Registration Application" as one of Revolution's salaried employees. (A. 58.)

Revolution.[10] Revolution did not file any information or evidence with the Secretary with regard to the conduct of St. Peter or Burnham but as their employer it is deemed to have knowledge of their activities.

The Secretary made no express findings of fact about fraud or forgery, but disqualified all of St. Peter's petitions, concluding that her oath "cannot be relied upon" and that "all of her petitions must be rejected as invalid." (A. 149, ¶ 8.) On these facts, to characterize the circulator's oath as unreliable is an understatement. The circulator takes an oath that she personally witnessed the signatures to the petition, and that to the best of her knowledge each signature is of the person whose name it purports to be. 21-A M.R.S. § 902. The unrebutted evidence is that the circulator committed perjury and that her petitions were forged. Nevertheless, the Secretary's decision is silent with regard to Burnham and whether Revolution intentionally submitted the forged St. Peter petitions or other fraudulent petitions or whether there was other misconduct at Revolution's Augusta field office. (*See* A. 149, ¶¶ 8, 10.)

D. Notaries Hired by the Proponent Violated Conflict of Interest Laws and Committed Other Misconduct.

The record contains substantial evidence that notaries hired by Revolution acted without legal authority because they violated conflict of

[10] (Mainers for Local Power M.R. Civ. P. 80C Br. at 17 n.9.)

interest laws[11] and engaged in other misconduct. The Secretary disqualified the petitions notarized by David McGovern, Sr. and Michael Underhill because these notaries had unlawful conflicts of interest in violation of 21-A M.R.S. § 903-E. (A. 147, ¶¶ 6(E), (F).) Both had circulated petitions for Revolution and later notarized petitions. (*Id*.) The Secretary also invalidated all of the petitions notarized by Brittany Skidmore prior to January 2, 2020, because she did not "properly administer[ ]" the oath to circulators. (A. 149, ¶ 6(I).) Skidmore did not read the oath to the circulators, did not ask for their identification, did not observe all of their signatures, and "often did not sign their petitions as notary until after the circulators had left her office." (*Id*.)

The record facts also demonstrate that Skidmore and two other notaries (Wesley Huckey and Leah Flumerfelt) provided both notarial and non-notarial services to promote the initiative campaign. (A. 147–48, ¶¶ 6(G), (I).) Whether their conduct violates Maine conflict of interest laws and requires that the petitions they notarized be invalidated, as McGovern's and Underhill's petitions were, is for this Court to decide.

PROCEDURAL HISTORY

On March 4, 2020, the Secretary issued a Determination of the Validity of the Petition. (A. 142.) Because the number of signatures found to be valid

[11] 21-A M.R.S. § 903-E; 4 M.R.S. § 954-A.

exceeded the number required by the Maine Constitution (10% of the total votes cast for Governor at the November 6, 2018, General Election) by 6,647, the Secretary validated the Petition. (A. 143.) The Secretary made no findings about fraud or notarial misconduct, even though complaints had been brought to his attention in the days before he made his determination. (*Id*. at n.1.)

On March 13, Delbert Reed, a Maine registered voter, filed a M.R. Civ. P. 80C appeal from the Secretary of State's Determination on the Validity of the Petition pursuant to 21-A M.R.S. § 905(2). (A. 39.) The Superior Court granted motions to intervene by Mainers for Local Power, IECG, and the Maine State Chamber of Commerce. (A. 3–4.)

On March 20, Petitioner filed a motion to take additional evidence, citing the absence of any administrative process or right to be heard before the Secretary issued his March 4 decision. Petitioner made a proffer that fraudulent petitions had been filed with the Secretary and that notaries used by the campaign had illegal conflicts of interest. The Secretary objected to any fact-finding in the Superior Court, but proposed a remand "for the purpose of taking additional evidence and making findings in response to allegations raised by Reed that appear to be material to the determination of validity."[12]

[12] (*See* Resp't's Mem. in Response to Pet'r's Mot. to Take Additional Evidence and Discovery at 2.)

The Secretary explained that he had been unable to timely "investigate the information provided by opponents of the initiative concerning activities by certain notaries who had administered oaths to circulators" before he had to issue his initial determination by the statutory 30-day deadline.[13]

On March 23, the Superior Court remanded the case to the Secretary "for the purpose of taking additional evidence, pursuant to 5 M.R.S. §11006 (1)(B)" and "to investigate all issues material to the validity of the petitions in the first instance." (A. 38.) On remand, the Secretary obtained information from certain notaries (but no circulators or supervisors), but did not allow the parties to gather evidence or to otherwise participate in the process.

On April 1, the Secretary issued an Amended Determination cutting the margin by which the petition had passed the threshold required by the Maine Constitution in half. The number of valid signatures exceeded the threshold by 3,050 signatures. (A. 152, ¶ 15.) Petitioner filed a second motion to take additional evidence. The Superior Court denied that motion. (A. 29.)

On April 13, 2020, the Superior Court (Business and Consumer Court, *Murphy, J.*) issued an order affirming the Secretary's Amended Determination. (A. 8.) Petitioner, IECG, and the Maine State Chamber of Commerce appealed.

[13] (*Id.*)

ISSUES PRESENTED FOR REVIEW

To limit overlap IECG focuses this brief on the following issues:

1. Did the Secretary err by misallocating the burden of proving the validity of petitions and then by accepting petitions as valid without investigating or requiring the Proponent to submit evidence rebutting fraud in its campaign?

2. Did the Secretary err by validating petitions that were notarized in violation of Title 4, Section 954, which prohibits notarial conflicts of interest?

SUMMARY OF THE ARGUMENT

IECG respects the right to petition and understands that the State has a compelling interest in protecting that right. That right is not placed at risk, however, by the vigorous and thorough administration of laws that guard against corruption and ensure the adequacy of petitions. There is a dramatic contrast between the exhaustive fact-finding processes NECEC emerged from—including legislation and agency action in Massachusetts, three major adjudicatory proceedings with sworn testimony, cross-examination, and public hearings in Maine, and approvals based on science, evidence, and reason—and the Secretary's perfunctory review of initiative petitions with

minimal investigation and no meaningful opportunity for the parties to participate despite evidence of fraud and pervasive illegal conflicts of interest.

The Secretary's decision to put the initiative on the ballot despite numerous violations of Maine law by its Proponent in collecting signatures and notarizing petitions imperils the financing and construction of NECEC without a valid legal basis for doing so, and it undermines the integrity of the initiative process. This creates not just legal uncertainty for NECEC, but political chaos for regulatory decision-making in Maine. Maine citizens who did not sign petitions, who make up the vast majority of Maine citizens, have rights too, including the right to have anti-corruption laws governing citizen initiatives rigorously enforced. Because the consequences of not enforcing anti-corruption election laws and disrupting a critical electric infrastructure project are so significant, fraud and illegal conflicts of interest by the Proponent should not be tolerated.

Where, as here, the Secretary has received sufficient evidence of fraud and prohibited conflicts of interest to require the invalidation of thousands of signatures, petitions submitted in support of an initiative are no longer presumptively valid. Instead, the burden shifts to the initiative proponent to rebut the evidence of fraud and conflicts of interest and to demonstrate the legality and validity of the petitions. The Proponent did not meet this burden.

The Secretary erred in misallocating the evidentiary burden to Petitioner, in failing to conduct his own investigation into evidence of fraud by the Proponent, and in declining to allow Petitioner to develop and present additional evidence. The Secretary's decision to accept the initiative campaign's petitions as valid without investigating fraud was legal error and an abuse of discretion and is unsupported by sufficient record evidence.

The Secretary also erred in validating petitions that were notarized in violation of Maine conflict of interest law, 4 M.R.S. § 954-A,[14] which prohibits notaries from wearing two hats for ballot initiative campaigns. Notaries have a longstanding legal obligation to avoid improper conflicts of interest. This obligation reflects the nature of the service notaries provide as impartial arbiters of the validity of important documents. Notaries guard against fraud and identity theft and play a crucial role in validating petitions submitted to the Secretary in support of ballot initiative campaigns. Under Maine law, notaries may provide either notarial services or non-notarial services to a ballot initiative campaign—but not both. Here, several of the paid notaries hired by the Proponent violated Maine law governing conflicts of interest for notaries, and were therefore unauthorized to perform notarial acts. The

[14] A related but not identical notarial conflict of interest law, 21-A M.R.S. § 903-E, is addressed in detail by Petitioner and the Maine State Chamber and therefore argument about that statute is not duplicated here.

Secretary erred as a matter of law when he accepted as valid petitions that were notarized in violation of the law.

IECG also joins in and supports the arguments presented by Petitioner and the Maine State Chamber of Commerce.

ARGUMENT

A. Standard of Review

The Law Court has consistently held that determinations made by the Secretary under 21-A M.R.S. § 905(1) are subject to the same standard of review applicable to any other decision by an administrative agency. In appeals from the Secretary's written decision on the validity of initiative petitions, the Superior Court acts in an appellate capacity and will "review the decision of the Secretary directly . . . for findings not supported by the evidence, errors of law, or abuse of discretion." *Knutson v. Dept. of Sec'y of State*, 2008 ME 124, ¶ 8, 954 A.2d 1054; *Palesky v. Sec'y of State*, 1998 ME 103, ¶ 9, 711 A.2d 129. Determinations involving "interpretation of constitutional and statutory provisions, which are issues of law," are reviewed de novo. *McGee v. Sec'y of State,* 2006 ME 50, ¶ 5, 896 A.2d 933.

This Court will defer to an agency's interpretation of ambiguous statutes it administers, including interpretations by the Secretary of ambiguous election laws, if the interpretation is reasonable. *Knutson*, 2008 ME 124, ¶ 18,

954 A.2d 1054. In this case, however, the Secretary claims much greater deference. He claims,[15] and the Superior Court Order ratified,[16] relying on dicta in a footnote in an opinion by this Court,[17] so-called "plenary" authority. The Secretary's authority to review and investigate petitions for fraud and to examine wrongdoing by the proponent of an initiative campaign is broad, but that is distinct from whether the Secretary's determination itself is subject to judicial review or any greater-than-normal level of deference. The Secretary's authority is limited by Article IV, Part Third, Section 22 of the Maine Constitution and statutes enacted by the Legislature under its constitutional authority "to establish procedures for determination of the validity of written petitions." ME. CONST. art. IV, pt. 3, § 22.[18] The "plenary authority" theory originated in a 1917 Opinion of the Justices under a rationale that ceased to apply after the Constitution was amended in 1975. *See Me. Taxpayers Action Network* v. Sec'y of State, 2002 ME 64, ¶12 n.8, 795 A.2d 75 (citing *Opinion of the Justices*, 116 Me. 557, 580–82, 103 A. 761, 771–72 (1917)).[19]

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[15] (*See* Resp't's M.R. Civ. P. 80C Opp. Br. (arguing that the secretary has "plenary power" to determine the validity of a petition).)

[16] (Order at 8.)

[17] *Me. Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, ¶12 n.8, 795 A.2d 75 (citing *Opinion of the Justices*, 116 Me. at 580–82, 103 A. at 771–72).

[18] "The initiative provisions of the Maine Constitution also grant the Maine Legislature the authority to carry out those constitutional mandates through legislation." *Id.* ¶ 10.

[19] In a footnote, the Law Court noted, "The executive officer charged with overseeing the petition process—formerly the Governor, now the Secretary of State—has plenary power to investigate and determine the validity of petitions." *Id*. ¶ 12 n.8. The Secretary may have plenary power to

In 1917 this Court recognized what was later characterized as the Governor's "plenary" authority to review signatures (even though the word "plenary" is not actually contained in the opinion) because, at that time, "the people's veto provisions [in the Maine Constitution] did not include the language relating to review established by procedures enacted by the Legislature." *Webster v. Dunlap*, No. AP-09-55, slip op. at *7–8 (Me. Sup. Ct. Ken. Cty., Dec. 21, 2009). Those provisions and a provision providing for judicial review were added by constitutional amendment in 1975. *Id*. Before the Constitution was amended, "the Governor alone" had authority to accept or reject signatures, unconstrained by appellate review, and if he lacked "plenary" authority to act that would mean that "no relief exists anywhere, a situation repugnant to the fundamental conception of our government and of the rights of the people." *Id*. at 8 (quoting *Opinion of the Justices*, 116 Me. 557, 103 A. at 771–72). The 1975 amendments solved this problem. Because the rationale underlying the 1917 interpretation "no longer applies," the Secretary does not have "plenary" authority to determine the validity of petitions. *Id*. at 9–10. He is bound to conduct his review of petitions in compliance with the Maine Constitution and applicable statutes. The

investigate, but that is distinct from whether he has such authority to make determinations about the validity of petitions.

Secretary is not judge, jury, and executioner as the Governor once was, long ago, with respect to the validity of citizen initiatives.

B. Safeguards against fraud and corruption preserve the integrity of the initiative process and protect the right to petition.

The Secretary's authority and responsibility to police fraud and enforce laws governing the conduct of notaries is grounded in the compelling state interest of preserving the integrity of the ballot initiative process. This Court has recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Me. Taxpayers Action Network,* 2002 ME 64, ¶ 8, 795 A.2d 75 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The U.S. Supreme Court has explained:

> A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.

Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam) (citations and quotation marks omitted). "[A] State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." *Bullock v. Carter,* 405 U.S. 134, 145 (1972); *see also Crawford v. Marion Cty. Election Bd.,* 553 U.S. 181, 225 (2008) ("There is no denying the abstract importance, the compelling nature, of combating voter fraud."). In the

landmark 1976 case of *Buckley v. Valeo*, the Supreme Court upheld compelled disclosure of campaign finance payments under the Federal Election Campaign Act of 1971, observing that such requirements "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." 424 U.S. 1, 67 (1976) (per curiam). The detection and investigation of fraud is essential to protecting the weighty interests in deterring actual corruption and avoiding the appearance of corruption.

Maine law has also long recognized the compelling government interest in keeping elections free of fraud. "The law abhors fraud, and nowhere looks upon it with greater aversion than when it affects the purity of the ballot upon which rest the security and permanence of our form of government." *In re Opinion of the Justices*, 126 A. 354, 366, 124 Me. 453 (1924). If "fraud" in an election process is alleged, "then it becomes the duty, as well as the privilege" of election officials "to make all necessary investigation and determine the facts." *Id*. at 364; *see also id.* at 365 (recognizing a "duty . . . to inquire into the facts and circumstances" of "fraudulent acts").

The Secretary's role in screening petitions to ensure sufficient bona fide grassroots support is also directly connected to the compelling state interest "in requiring some preliminary showing of a significant modicum of support

before" qualifying an initiative for the ballot—"the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Along the same lines, this Court has recognized that the unrestrained power to block legislative action by a "small minority of the people" is "the power to produce absolute chaos." *Morris v. Goss,* 147 Me. 89, 93, 106–08, 83 A.2d 556 (1951). To prevent chaos, the proponent of an initiative must gather a minimum number of signatures under the Constitution. Me. Const. art. IV, pt. 3, § 18(2). The Secretary is charged with reviewing all petitions filed in support of an initiative, determining their validity, and issuing "a written decision stating the reasons for the decision." 21-A M.R.S. § 905(1).

The integrity of the initiative process depends upon action by the Secretary to detect, investigate, prevent, and deter fraud and corruption, and to compel strict compliance with laws protecting the integrity of the process. Maine election laws must be interpreted with due regard to effectuating the compelling interest in policing fraud and protecting the electorate from chaos.

C. The Secretary erred by misallocating the burden of proof and by accepting petitions as valid without requiring the Proponent to submit evidence to rebut fraud and conflicts of interest.

Under Maine law, a "presumptive element of legality and validity" attaches to petitions and notary attestations in connection with a ballot

initiative—but that presumption vanishes "[w]hen fraud is proven." *In re Opinion of the Justices*, 124 Me. 453, 126 A. 354, 366 (1924); *see also Birks v. Dunlap*, No. BCD-AP-16-04, 2016 WL 1715405, at *8 n.10 (Me.B.C.D. Apr. 8, 2016) (stating that "other jurisdictions" also include a similar presumption "in the absence of evidence of fraud."). "The mingling of the spurious with the genuine prevents" the Secretary from presuming that petitions are legal and valid. *Opinion of the Justices*, 126 A. at 366. Where fraud is apparent, this Court advised that the process must be to develop "satisfactory proof . . . of the exact number" of spurious election records, or, if "such proof is lacking, then the fraud, if proven, has opened the door to extraneous evidence so that other proof may be adduced" to establish the facts, which "can be done by sworn testimony . . . or by depositions . . . ." *Id.* A properly verified and certified petition "is prima facie evidence of its validity, but it *is not conclusive.*" *Opinion of the Justices*, 116 Me. 557, 103 A. 761, 772 (1917) (emphasis added). That prima facie evidence can be overridden by evidence of forgery or fraud. *Id*. This Court explained:

> *Fraud opens all doors* and if the governor has good reason to believe that an attempt has been made to defraud the people of their rights by a false certificate we think he has the power in his own discretion to ascertain the truth, giving of course due notice and hearing to the parties interested and especially to the clerk whose certificate is attacked.

Id. (emphasis added). The power to investigate fraud plays a role in deterring fraud and protecting the public's confidence in the process, and "the knowledge of the existence of this power in the governor to reject forged names and names falsely certified may tend to prevent fraud and to protect the referendum from disrepute." *Id*. at 581–82. Of course, the Secretary, not the Governor, is now charged with a gatekeeping function to determine the validity of petitions pursuant to 21-A M.R.S. § 905, but the principles laid out in these opinions remain good law.

The principle that the presumption of legality and validity no longer attaches upon a showing of irregularities or fraud is consistent with election law in other states that allow citizen initiatives. *See, e.g.*, *Montanans for Justice v. State ex rel. McGrath,* 2006 MT 277, ¶ 72, 334 Mont. 237, 260, 146, P.3d 759, 775 (the "presumption of validity may be rebutted and overcome by affirmative proof of willful fraud or procedural noncompliance"). The general rule is that "[o]nce evidence is presented to rebut the presumption of validity, it is incumbent upon the party endorsing the validity of the signatures to come forward with evidence to rebut or counter the damaging evidence." *Id.* at 775. "When irregularities in circulator affidavits or notary attestations are found, those irregularities rebut the prima facie validity of the petition." *United Labor Comm. of Missouri v. Kirkpatrick*, 572 S.W.2d 449, 453 (Mo. 1978). "The

burden is then shifted to the proponents of the signatures . . . to show the underlying validity of those signatures." *Id*.[20]

This burden-shifting makes good sense because the proponent of an initiative is in the best position to refute opponents' evidence of false affidavits or other misconduct. *Montanans for Justice*, 146 P.3d at 775; *cf. Underwood v. City of Presque Isle*, 1998 ME 166, ¶ 18, 715 A.2d 148 (quoting *Fisher v. Maricopa Cty. Stadium Dist.*, 185 Ariz. 116, 912 P.2d 1345, 1351 (App. 1995)) ("[R]equiring a plaintiff to plead and prove specific facts regarding alleged violations that are taking place in secret is a circular impossibility.").

Two types of serious irregularities present in this initiative campaign—fraud and conflicts of interest—are sufficient to rebut the presumption in favor of the legality and validity of the petitions. The burden of proof therefore shifts to the Proponent to show that the petitions are valid. The

[20] *See also Tyler v. Sec'y of State*, 229 Md. 397, 405–06, 184 A.2d 101, 105–06 (1962) ("Upon proof of the falsity of the affidavit, the prima facie presumption of the validity of the petition, or a sheet thereof, ostensibly verified by the affidavit, must fail, along with all the signatures thereon, and the burden is cast upon the proponents of the referendum to affirmatively show that the remaining signatures on such petition or sheet thereof are genuine and bona fide . . . ."); *Ellis v. Hall*, 219 Ark. 869, 873, 245 S.W.2d 223, 225 (1952) (adopting the rule that "where fraud on the canvassers' part is shown 'the *prima facie* case made by the affidavits of these circulators in favor of the genuineness of these petitions is overcome, putting the burden of proof upon the defendant to establish the genuineness of each signature'"); *Whitman v. Moore*, 59 Ariz. 211, 125 P.2d 445, 453 (1942), *overruled on other grounds by Renck v. Sup. Ct. of Maricopa Cty*, 66 Ariz. 320, 187 P.2d 656, 660 (1947) (holding that a "deviation from the constitutional requirements" places "upon the one desiring to sustain the signature the burden of proving by evidence aliunde [outside] the petition that the signer was qualified in all respects"); *State ex rel. McNary v. Olcott*, 62 Or. 277, 285, 125 P. 303, 307 (1912) (upon a finding of circulator forgery "the prima facie case made by the affidavits of these circulators in favor of the genuineness of these petitions is overcome, putting the burden of proof upon the defendant to establish the genuineness of each signature").

Secretary failed in his responsibility to hold the Proponent to its burden. The Secretary had sworn evidence of forgery, a species of fraud,[21] by a Revolution circulator Megan St. Peter. (A. 254–55.) The Secretary invalidated all petitions collected by St. Peter. (A. 150.) It has since come to light that she was fired, apparently because of fraud.[22] The Secretary also received a complaint by counsel for Petitioner that a supervisor at Revolution's Augusta field office knew that petitions had been forged but submitted them to the Secretary anyway. (A. 231–32.) This evidence is indicative of pervasive structural problems in a for-profit signature-gathering campaign organized by an out-of-state consulting business.

Turning to conflicts of interest, the Secretary invalidated all petitions that were notarized by two campaign notaries (McGovern and Underhill) because they circulated petitions and subsequently notarized petitions. (A. 147, ¶¶ 6(E), (F).) Though the Secretary relied on 21-A M.R.S. § 903-E to invalidate these unlawful petitions, he could have also relied on 4 M.R.S. § 954-A. Whether three additional notaries (Huckey, Flumerfelt, and

[21] "While it is true that there is a distinction between fraud and forgery, and forgery contains some elements that are not included in fraud, forgeries are a species of fraud." Black's Law Dictionary 722 (9th ed. 2009) at 752 (quoting 37 C.J.S. Forgery § 2 at 66 (1997)).

[22] (*See* Mainers for Local Power M.R. Civ. P. 80C Br. at 17 n.9 (revealing that St Peter "was fired for possible signature fraud").) The record contains no evidence that Revolution disclosed anything about "possible signature fraud" to the Secretary or of why it fired her but still submitted the petitions she collected to the Secretary.

Skidmore) had unlawful conflicts of interest requiring that the petitions they notarized be invalidated is one subject of this appeal. The Secretary's investigation into conflicts of interest also revealed that one of the paid notaries hired by Revolution (Skidmore) "did not administer the oath to circulators in an authorized manner," because she failed to read the oath to circulators, ask them for identification, and witness their signatures, or notarize the petitions in their presence. (A. 149, ¶ 6(I).) As a result, the Secretary invalidated all petitions Skidmore notarized before January 2, 2020, eliminating 1,873 signatures that had been counted as valid in the Secretary's March 4, 2020 decision. (*Id*.). The evidence of fraud and conflicts of interest and other irregularities in the initiative campaign was sufficient to rebut the presumption of legality and validity and shift that burden to the Proponent.

With the burden shifted, the Proponent had an obligation to show that the petitions and notary attestations were legal and valid. Yet the Proponent submitted no evidence to explain the fraud the Secretary found or to address its scope and extent. It submitted no evidence about the activities of the paid circulator implicated in the forgery. Nor did it submit any evidence regarding her supervisor and Revolution's Augusta Field Office Coordinator, Melissa Burnham. (A. 231–32.) Revolution did not respond in any way to the complaint submitted to the Secretary by the Petitioner indicating that it was

aware of the fraud but went ahead and submitted forged petitions to the Secretary anyway. On these facts, the Proponent did not meet its burden to show the validity of the petitions it submitted to the Secretary.

Even without the submission of any evidence by the Proponent of the initiative to rebut fraud, the Secretary should have engaged in a fact-finding process to get to the bottom of the fraud. Where the presumption of legality and validity of petitions no longer applies, the Secretary has the authority and obligation to investigate before he can accept petitions as valid. *See In re Opinion of the Justices*, 124 Me. 453, 126 A. at 364 (if "fraud" in an election process is alleged, "then it becomes the duty, as well as the privilege" of responsible officials "to make all necessary investigation and determine the facts"). The Secretary does not dispute that he has such authority and obligation. (*See* Resp't's M.R. Civ. P. 80C Opp. Br. at 11 (Secretary has "both the authority and the obligation to conduct investigations into the validity of petitions").) And this Court has held that an unjustified failure to investigate constitutes an abuse of discretion. *See Friedman v. Pub. Utilities Comm'n*, 2012 ME 90, ¶ 4, 48 A.3d 794 (reversing, after abuse-of-discretion review, a decision by the PUC not to "open an investigation" to consider "new and important evidence" about smart-meter technology). But a fraud investigation did not happen. This was error.

The Petitioner requested that the Secretary investigate, or at least allow Petitioner to develop further evidence of fraud. (*See, e.g.*, A. 249–53.) But the Secretary not only failed to investigate, he blocked Petitioner from obtaining this evidence by objecting to motions in Superior Court to take additional evidence, either on remand or in the Rule 80C proceeding.

The Secretary's investigation focused exclusively on conflicts of interest, not fraud. The investigation into conflicts of interest included sending letters to nine notaries asking a series of questions and requesting several types of documents—as well as interviews and follow-up questions. The investigation revealed that the conflicts of interest were real, as noted above. In sharp contrast, the record contains no evidence of any investigation by the Secretary into fraud. No questions were asked of the relevant circulator (St. Peter) or her supervisor (Burnham) or their employer (Revolution).

Rather, the Secretary reviewed two sworn affidavits submitted by Petitioner, and determined: "The evidence persuades me that the oath of this circulator cannot be relied upon, and, accordingly, I conclude that all of her petitions must be rejected as invalid." (A. 149–50, ¶ 8.) This is not an investigation. It is a review of evidence uncovered and submitted by Petitioner, who did not have the investigatory tools and powers of the Secretary, powers the Secretary refused to employ. Because the

administrative record does not contain any evidence submitted by the Proponent to rebut the evidence of fraud by paid staff at Revolution, and the Secretary refused to develop any evidence of his own to address the fraud, there is insufficient record evidence to validate the petitions submitted by Proponent's petition organization, Revolution.

As noted above, where fraud is present, the burden falls on the proponents of an initiative to present affirmative evidence of the validity of petitions. The Secretary erred by not shifting the burden of proof to the Proponent to rebut the evidence of fraud. The Secretary's error is evidenced by his rationale for not investigating fraud. He explained that he was not engaging in a "full-scale investigation of potential fraud" because Petitioner did not "point[ ] to any other indications of fraud." (A. 150, ¶ 10.) But Petitioner had produced enough evidence of fraud (and other irregularities) to rebut the presumption of legality and validity. The burden thus fell on the Proponent to produce sufficient evidence to validate the petitions.

The Secretary's other reason for not investigating fraud is that he received no reports of fraud from municipal officials. (A. 150, ¶ 10.) But the silence of municipal officials is not evidence that there was no fraud; it is evidence that municipal officials cannot be relied on to report fraud. Municipal officials are not constitutional officers obligated to investigate the

validity of petitions, and they did not have the evidence of fraud that Petitioner uncovered and made available to the Secretary. The Secretary may not outsource his obligation to investigate fraud to citizens and municipalities.

If the Secretary's decision stands, the precedent will be set that minimalist scrutiny by the Secretary—without any meaningful due process afforded to the public—is sufficient, and only overt acts discovered by concerned (and lucky) citizens will be remedied. The message to dishonest campaigns will be clear: fraud is not taken seriously in Maine, only fraud that happens to fall into the lap of the Secretary will be acted upon, and the Secretary has no enforceable obligation to investigate.

D. The Secretary erred by validating petitions that were notarized in violation of Maine law prohibiting conflicts of interest.

A notary public is an ancient office dating back before the Roman Empire. A notary acts as a "liaison between the government and its citizens; facilitating the authorization of numerous transactions." Maine Secretary of State, Notary Public Handbook and Resource Guide at Forward (Sept. 9, 2019) (hereinafter "Maine Notary Handbook").[23] A notary is a "public official and

[23] Available at https://www.maine.gov/sos/cec/notary/notaryguide.pdf. The Secretary's Maine Notary Handbook is a published official guide for notaries. It does not have the force of law but is entitled to "some deference" and "respect" and may be considered for its persuasive value. *Christensen v. Harris Cty*., 529 U.S. 576, 587 (2000); *see also Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

servant," and courts have recognized notaries as "public officers." The Notary Public Code of Professional Responsibility at 7 (National Notary Association, 2020) (hereinafter "Notary Code")[24]; *Britton v. Nicolls*, 104 U.S. 757, 765 (1881) (recognizing notary as "a public officer whose duties were prescribed by law"). When notarizing an initiative petition a notary "is performing official services" and acting as "a public servant." Notary Code at 10.

As public officers, notaries "must be worthy of the public trust." 29-250 C.M.R. ch. 700, § 1(B). They "are not mere ministerial functionaries, but rather are officers who exercise discretion and judgment, and are professionals who are therefore bound by the relevant professional responsibilities . . . ." Notary Code at 7–8. The Maine Secretary of State recognizes that a notary is "[m]ore than simply a scrivener," and holds a position of public trust "by providing a vital public service in the fairest and most professional way possible." Maine Notary Handbook at Forward. Notaries "must execute their official duties consistent with the demands imposed on public officers." Notary Code at 7.

Notaries have a professional obligation to serve the public in an "honest, fair, and impartial manner." *Id.* at 1. They are obligated to "act as an impartial witness." *Id.* at 13. That being so, a notary must "avoid actual and apparent

[24] Available at https://www.nationalnotary.org/File%20Library/NNA/Reference-Library/Code-of-Professional-Responsibility-2020.pdf.

conflicts of interest." *Id*. at 17. Indeed, a notary "has an absolute duty by law to act impartially when performing notarial duties." *Id*. at 17 (quoting Peter Van Alstyne, Notary Public Encyclopedia, at 55 (2001)). The Maine Notary Handbook says, "A Notary Public must not act in any official capacity if there is any interest which may affect impartiality." *Id*. at 18. "The appearance of a potential conflict of interest can be as damaging to the transaction and/or a Notary Public's reputation as the actual conflict of interest." *Id*. at 19.

The Notary Code explains why notaries have a professional obligation to avoid actual and apparent conflicts of interest:

> The reason is the concern that an actual or apparent conflict of interest may corrupt or tempt the Notary away from the impartial role demanded of a public official and diligent adherence to proper notarial procedures. To assure compliance and to guide the Notary along the high road of professional practice, the various Standards when taken together broadly disqualify the Notary from acting where either an actual or apparent conflict exists.

Notary Code at 17. In short, notaries have a duty to "take all reasonable steps to avoid a conflict of interest, even if the action at issue may otherwise be legal." *Id*.

In light of notaries' duty to avoid improper conflicts of interest, it is unsurprising that the Maine Constitution gives notaries a key role in the initiative process and that election laws explicitly prohibit certain notarial conflicts of interest. The signature-collection system for initiatives hinges on

the integrity of notarized documents. In a statute titled "Conflict of interest," the Legislature designated certain notarial acts that "a notary public may not perform." 4 M.R.S. § 954-A. The statute provides:

> A notary public may not perform any notarial act for any person if that person is the notary public's spouse, parent, sibling, child, spouse's parent, spouse's sibling, spouse's child or child's spouse, except that a notary public may solemnize the marriage of the notary public's parent, sibling, child, spouse's parent, spouse's sibling or spouse's child. *It is a conflict of interest for a notary public to administer an oath or affirmation to a circulator of a petition for a direct initiative or people's veto referendum under Title 21-A, section 902 if the notary public also provides services that are not notarial acts to initiate or promote that direct initiative or people's veto referendum.*

Id. (emphasis added). Although the second sentence of section 954-A does not repeat the "may not perform any notarial act" language of the first sentence, the section's structure makes clear that the prohibition also applies to the conflict of interest identified in the second sentence. The first sentence lists family relationships creating a prohibited conflict. The Legislature's intent in adding a second sentence in 2017 was to define an additional type of relationship, unrelated to family, as a prohibited conflict for which a notary "may not perform." The Legislature could not have intended to designate a second category of conflicts of interest for which notaries actually retain the authority to act. Prior to 2017, the statute dealt exclusively with situations

where notaries have no authority to act—if the Legislature had intended the 2017 amendment to have the opposite effect, it would have explicitly said so.

If a public official like a notary "may not perform" an act, and the official nevertheless does so, the resulting act is necessarily invalid. That is the Secretary's own interpretation of 4 M.R.S. § 954-A. In this very proceeding he invalidated signatures "because the notary was related to the circulator," i.e., because the notary violated the first sentence of 4 M.R.S. § 954-A.[25] (A. 151, ¶ 2(O).) The second sentence of the statute also identifies acts that a notary may not perform for an initiative campaign, because those acts are also a conflict of interest. It would be illogical to interpret the statute in such a way as to invalidate signatures collected by a notary in violation of the first sentence of section 954-A, as the Secretary has done in this instance, but to accept as valid signatures collected in violation of the second sentence of the same statute in the same initiative.

The plain language of section 954-A—"if the notary public also provides services that are not notarial acts"—prohibits the performance of non-notarial services before, during, or after the notary provides services to initiate or promote a direct initiative. If any such services are provided, that is an

[25] There is no other basis to invalidate signatures because of a familial relationship between a notary and a circulator.

unlawful conflict of interest. The purpose of the statute is obvious: to ensure that notaries performing services for campaigns are impartial and free of conflicts of interest that may corrupt or tempt them away from "diligent adherence to proper notarial procedures." Notary Code at 17; *see also In re Berg*, 973 A.2d 447, 449 (2009) ("The purpose of such a statute is to ensure impartiality on the part of a notary with regard to the matter before him.").

Any notarial services performed in violation of the conflict of interest statute are unlawful and therefore invalid. An unlawful conflict of interest "disqualify[ies] the [n]otary from acting," and thus invalidates their action. Notary Code at 17. An unlawful conflict of interest in violation of 21-A M.R.S. §903-E is what the Secretary found with regard to David McGovern, Sr. and Michael Underhill, leading the Secretary to invalidate the petitions they notarized. (A. 147, ¶¶ 6(E), (F) (in each case the Secretary found that because the notaries were "not authorized . . . the petitions he notarized are invalid").) Likewise, an unlawful notarial conflict of interest in violation of 4 M.R.S. § 954-A is also grounds to invalidate petitions, because notaries are also disqualified from acting under that statute.

This principle finds support in the law in other jurisdictions. In *Citizens Committee to Recall Rizzo v. Board of Elections of City and County of Philadelphia*, "affidavits notarized by sixteen people were found . . . to have

been illegally notarized because these people had a direct interest in the matter. These sixteen included the attorney for the Recall Committee, the coordinator and two salaried employees of the Committee [to Recall Rizzo] who were also circulators of the petition, and twelve persons who were only circulators." 470 Pa. 1, 22 (1976). The court first ruled that "these people had a direct interest within the meaning of our statute which would bar their notarization of these affidavits." *Id*. at 22–23. The Court explained:

> These persons were separate and apart from the general public with regard to their interest in this petition. They were [dedicated] to the success of this petition, eventually seeking the removal of the Mayor. All were actively involved in the yeoman effort to promote the recall, whether in the organization of the driver or in the actual solicitation of the signatures necessary for its success. When one steps beyond the point of signing his name to a petition and actually solicits other signatures, he has more than a general interest as a citizen in the outcome. By notarizing these affidavits they were performing an act essential to the achievement of their interest since affidavits are required for filing of the petition. They were advancing their own interests by ensuring the success of their efforts and the achievement of their political goals. This is the type of action by a notary public which the statute is designed to prevent because the impartiality which lends credence to the authenticity of the affidavit is destroyed.

Id. at 23 (footnote and citation omitted). The court then held that the conflict-of-interest provision in the notary statute "barred these people from acting as notaries in this case." *Id.* at 24. And "[s]ince this section is a limitation upon the power of notaries to act, their acts were nullities and the affidavits were void." *Id*. ("The Board, therefore, properly rejected the signatures to which

these void affidavits were appended."). Other jurisdictions have adopted the same rule. *See Howell v. Tidwell*, 258 Ga. 246, 247, 368 S.E.2d 311, 312–13 (1988) ("Having established themselves as active officers and spokepersons for the recall effort, the appellants became more than generally interested electors. Hence, any pages with affidavits notarized by the appellants or either of them were properly disregarded." (citation omitted)); *In re Berg,* 973 A.2d at 449–52 (ordering that candidate's name be removed from ballot where he violated state law providing that "[n]o notary public may act as such in any transaction in which he is a party directly or pecuniarily interested").

The Secretary relegates 4 M.R.S. § 954-A to a footnote in his Amended Determination and does not address whether any of Revolution's notaries had conflicts of interest in violation of that statute. (A. 146, n.1.) This was error, as a violation of 4 M.R.S. § 954-A disqualifies a notary from giving an oath. The Secretary abused his discretion and erred as a matter of law by failing to determine whether any of the notaries in question violated section 954-A.

Because three of the notaries at issue (Wesley Huckey, Leah Flumerfelt, and Brittany Skidmore) had conflicts of interest in violation of 4 M.R.S. § 954-A, the petitions they notarized must be invalidated. Wesley Ryan Huckey delivered petitions to a campaign field office. (A. 147, ¶ 6(G).) The Secretary characterizes this as a "*de minimis* violation" (*id.*), but there is no *de minimis*

exception to the prohibition against conflicts of interest by notaries promoting ballot campaigns. The authority to create exemptions properly belongs to the Legislature; the Secretary may not circumvent the Legislature's authority by excusing unlawful notarial conflicts of interest because he considers them to be relatively minor. *Cf. Rowe v. City of South Portland*, 1999 ME 81, ¶¶ 8, 11, 730 A.2d 673 (declining to adopt a *de minimis* exemption to zoning laws where doing so would "circumvent" legislative authority). Because Huckey provided non-notarial services to promote the initiative, he violated 4 M.R.S. § 954-A, and the petitions he notarized are invalid.

Leah Flumerfelt was "originally recruited" to serve as a circulator for the campaign by her father, John Flumerfelt, and was listed by Revolution on the list of circulators submitted to the Secretary on their petition registration form filed on February 3, 2020, the same day they submitted the petitions. (A. 147–48, ¶ 6(H).)[26] John Flumerfelt's daughter, Leah, performed notarial and various non-notarial services for Revolution, including delivering petitions, organizing petitions, and office work. (A. 148, ¶ 6(H).) This sequence of

[26] John Flumerfelt is an executive with Calpine Corporation ("Calpine"), and a "funder" of Mainers for Local Power. (R.7 at 2.) Calpine vigorously opposes NECEC and John Flumerfelt testified against NECEC in the PUC's proceeding. *See* Central Maine Power Company, *Request for Approval of CPCN for the New England Clean Energy Connect Construction of 1,200 MW HVDC Transmission Line from Quebec-Maine Border to Lewiston (NECEC) and Related Network Upgrades*, No. 2017-00232, Tr. for Hearing on Stipulation at 73:14-75:15 (Mar. 7, 2019).

events undermined the integrity of the process by calling into doubt Flumerfelt's impartiality and creating at least an appearance of impropriety. Because Flumerfelt provided non-notarial services to promote the initiative, she violated 4 M.R.S. § 954-A, and the petitions she notarized are invalid.

As for Brittany Skidmore, the Secretary found that she performed "non-notarial services." (A. 148, ¶ 6(I).) Skidmore reviewed petitions "to make sure that the circulator's name and number had been properly placed in the box at the upper corner of the petition, front and back," and performed services by "filling in the circulator's name and number in the boxes on the petition forms." (*Id*.) In exchange for her non-notarial work, Revolution paid her. This undermined the integrity of the process by creating questions about Skidmore's impartiality that give rise to at least an appearance of impropriety. Because Skidmore provided "non-notarial services" to promote the initiative in violation of 4 M.R.S. § 954-A, the petitions she notarized are invalid.

The Secretary declined to disqualify the petitions Flumerfelt and Skidmore notarized, not because he found that they had complied with 4 M.R.S. § 954-A, but because he determined that they complied with 21-A M.R.S. § 903-E. According to the Secretary, Section 903-E prohibits only simultaneous conflicts of interest, because the statute uses the phrase "is providing" (A. 148-49, ¶¶ 6(H), (I))—a position that is debunked by

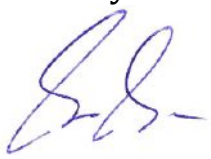
Petitioner and the Maine Chamber. The key point is that the text of section 903-E cannot control the interpretation of 4 M.R.S. § 954-A, because the phrasing the Secretary relies on—"is providing"— is absent from Section 954-A. Under Section 954-A, "if the notary public *also provides* services that are not notarial acts to initiate or promote that direct initiative[,]" then the notary public has an unlawful conflict of interest. (emphasis added). As explained above, "also provides" requires that notaries for an initiative campaign provide either notarial services or non-notarial services, but not both.

CONCLUSION

IECG respectfully requests that this Court vacate the Secretary's determination of the validity of the petition under review.

Dated at Portland, Maine this 23rd day of April, 2020.

Respectfully submitted,



Sigmund D. Schutz, Bar No. 8549
Anthony W. Buxton, Bar No. 1714
Robert B. Borowski, Bar No. 4905

Counsel to Industrial Energy Consumer Group
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 9546, One City Center
Portland, ME 04112
Telephone: 207-791-3000

CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, Attorney for Industrial Energy Consumer Group, certify that I have, this date, served by email (by agreement of counsel) the IECG Brief to the attorneys listed below.

Phyllis Gardiner, Esq.
Office of the Attorney General
6 State House Station
Augusta, ME 04333
phyllis.gardiner@maine.gov

Nolan L. Reichl, Esq.
Newell Augur, Esq.
Jared des Rosiers, Esq.
Pierce Atwood
254 Commercial Street
Portland, ME 04101
nreichl@pierceatwood.com
naugur@pierceatwood.com
jdesrosiers@pierceatwood.com

Joshua A. Tardy, Esq.
Josh A. Randlett, Esq.
Rudman Winchell
84 Harlow Street
P.O. Box 1401
Bangor, Maine 04402
jtardy@rudmanwinchell.com
jrandlett@rudmanwinchell.com

David M. Kallin, Esq.
Adam R. Cote, Esq.
Elizabeth C. Mooney, Esq.
Amy K. Olfene, Esq.
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101-2480
DKallin@dwmlaw.com
ACote@dwmlaw.com
emooney@dwmlaw.com
AOlfene@dwmlaw.com

Chris Roach, Esq.
Roach Ruprecht
Sanchez & Bischoff PC
527 Ocean Avenue, Suite 1
Portland ME 04103
croach@rrsblaw.com

Gerald F. Petruccelli, Esq.
Nicole R. Bissonnette, Esq.
Petruccelli, Martin & Haddow LLP
Two Monument Square, Suite 900
Post Office Box 17555
Portland, Maine 04112-8555
gpetruccelli@pmhlegal.com
nbissonnette@pmhlegal.com

Dated: April 23, 2020

Sigmund D. Schutz, Bar No. 8549
Attorney for Industrial Energy
Consumer Group

PRETI, FLAHERTY, BELIVEAU,
& PACHIOS, LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Tel: 207-791-3000
Fax: 207-791-3111